U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: DEC 24 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen. The AAO will dismiss the motion.

The petitioner filed a Form I-140 petition on January 4, 2010, seeking classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as either a chief executive officer (CEO) or a patent agent/attorney. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director denied the petition on August 12, 2010, having found that the petitioner established eligibility for classification as a member of the professions holding an advanced degree, but not for a national interest waiver of the statutory job offer requirement. The AAO dismissed the petitioner's appeal from that decision on December 14, 2011.

Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1)(i). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On the cover page of its December 14, 2011 dismissal notice, the AAO advised the petitioner: "Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen." The petitioner filed the motion on September 28, 2012, more than nine months after the AAO decision that the petitioner seeks to reopen.

To give context to the petitioner's explanation for the delay in filing, there follows a summary of the facts of the proceeding, as set forth in the AAO's dismissal notice.

When the petitioner filed the petition, he stated that he intended to work as a CEO who would "Start up and manage a new technology company, developing a software platform to deliver and sell on-demand software, [redacted]," to pursue an "invention [redacted]." Other materials, however, indicated that the petitioner wished to work as an attorney practicing patent law. The record showed that the petitioner was, at the time of filing, a law student who was not yet eligible to practice law. After he filed the petition, the petitioner established [redacted] and expressed his intention to represent [redacted] as a patent attorney.

In its dismissal notice, the AAO stated:

> [T]he petitioner suggested that he may serve the national interest as a patent attorney, even though he was still a law student. The petitioner cannot obtain a national interest waiver now, based on the expectation that he will one day qualify to practice

law. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

More fundamentally, the petitioner has not established any past history of demonstrable achievement, either as a CEO or as a patent attorney, with some degree of influence on the field as a whole. He cannot have done so, because when he filed the petition, he had never been either a CEO or a patent attorney. The petitioner based his waiver application not on any track record of success, but on his confidence that his software delivery system will eventually be successful once he introduces it to the market.

In short, the AAO made it clear that the petitioner could not use his 2010 petition as a "placeholder" for a backdated national interest waiver, based on work that he was not yet qualified to do in 2010. One must first reach a level of achievement that would warrant the national interest waiver, and then file the petition; one cannot file the petition first, on the expectation that one will eventually become eligible for the waiver. The regulations and case law on this point are unambiguous.

The petitioner acknowledges the delay in filing the motion, but explains that, at the time of the dismissal notice, he was pursuing litigation against the U.S. Patent and Trademark Office (USPTO). The petitioner claims that the USPTO had unlawfully denied him registration as a patent agent on the basis of his immigration status. (The District Court for the District of Columbia ruled in favor of the USPTO; the petitioner has appealed the ruling.) The petitioner states:

> In December 2011, the parties of the District Court case had completed their respective summary judgment motions and was awaiting for [*sic*] the District Court's decision. Petitioner planned to file this Motion immediately after the District Court makes a decision. The District Court, however, did not make a decision until September 13, 2012. Because the District Court took more than expected time to render a decision, Petitioner submits that the delay of this Motion is beyond the control of Petitioner and is reasonable.

The AAO did not dismiss the appeal simply because the petitioner was not a registered patent agent. Rather, as explained in the dismissal notice, the AAO found that the petitioner had not established any sort of track record either as a CEO or as a patent attorney, and USCIS will not approve national interest waivers based purely on speculation about what the petitioner might accomplish once he is qualified to pursue a given profession. The petitioner's litigation against [redacted] is, at best, tangentially relevant to the matter now under consideration. The timing of the court's decision was certainly beyond the petitioner's control, but the petitioner has not shown that waiting nine months for that decision before filing the motion constitutes a reasonable delay. The petitioner's pursuit of litigation against the [redacted] does not oblige USCIS to keep his proceeding open while the litigation is ongoing. Unless

USCIS directs otherwise, the filing of a motion to reopen does not stay the execution of any decision in a case. 8 C.F.R. § 103.5(a)(1)(iv).

The AAO will dismiss the motion to reopen as untimely filed.

On October 31, 2012 and again on December 10, 2012, the AAO received additional statements and evidence from the petitioner, intended to supplement the motion. The regulation at 8 C.F.R. § 103.3(a)(2)(vii) permits a petitioner to supplement a previously-filed appeal. There is, however, no parallel regulation to allow a petitioner to supplement a previously-filed motion. Form I-290B, Notice of Appeal or Motion, reflects this situation. Part 2 of that form gives the petitioner the option to state: "I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days." The form provides no similar option, however, for motions.

The AAO notes that the supplemental submissions concern the further progress of the petitioner's lawsuit against [redacted] as well as evidence of the petitioner's admission to the Massachusetts bar on November 26, 2012, two months after the filing of the motion and almost three years after the filing of the petition on January 4, 2010. Even if these materials had accompanied the timely filing of a motion, they do not establish that the director should have approved the petition or that the AAO should have reversed the director's decision. The materials do not address the AAO's key findings. Admission to a state bar is not *prima facie* evidence of eligibility for the national interest waiver, nor can it retroactively show that the petitioner was eligible for the waiver long before that admission.

The petitioner's untimely filing does not meet all of the requirements for a motion to reopen. Therefore, the regulation at 8 C.F.R. § 103.5(a)(4) requires the AAO to dismiss the motion.

ORDER: The motion is dismissed.